

## **PROGRAM MEMO**

Program Memo: Title 390, Protection and Safety, #7-2005

Date: August 11, 2005

To: Holders of Title 390

From: Todd Reckling, Administrator  
Office of Protection and Safety

Signed by \_\_\_\_\_, Director  
Department of Health and Human Services

\_\_\_\_\_  
Date

### **RE: INDIAN CHILD WELFARE ACT (ICWA)**

Effective Date: August 11, 2005

Duration: Until regulation is revised.

Contact: If you have any questions about this program memo, please contact Chris Hanus at (402) 471-9308, in the Office of Protection and Safety, Central Office.

The Indian Child Welfare Act (ICWA) is a federal law that was passed in 1978. ICWA was passed to protect Indian families and preserve the ties between Indian children and their tribes. Congress found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly percentage of such children are placed in non-Indian foster and adoptive homes and institutions." Congress sought to protect the connections between Indian children and their cultures and stated that ICWA is in the best interest of Indian children.

To enhance compliance with the federal ICWA, the Nebraska Legislature enacted the Nebraska ICWA in 1985. The Nebraska ICWA contains many of the provisions of the federal ICWA, but all ICWA cases must comply with the federal law. Both the federal ICWA and the Nebraska ICWA provide that the law that provides the higher standard of protection applies and, if there seems to be a conflict between a state law and the Federal ICWA, then the Federal ICWA must be applied and followed.

The purpose of this program memo is to clarify the responsibilities of Office of Juvenile Services Workers and Protection and Safety Workers in Indian Child Welfare Act cases.

## **JURISDICTION**

If an Indian child is a resident of or domiciled on a reservation or if the child is a ward of a tribal court, the tribe has exclusive jurisdiction over the child. The Department (HHS) may remove a child in an emergency if the child is located off of the reservations. Immediately following the removal the Department must notify the child's tribe.

For an Indian child who is a resident of or domiciled in Nebraska, not on a reservation, and who is not a ward of a tribal court, HHS may remove the Indian child if:

1. an emergency exists, defined as imminent physical danger to the Indian child, or
2. if HHS has initiated a child custody proceeding in compliance with ICWA and received a foster care placement order from a court.

## **IDENTIFYING INDIAN CHILDREN**

In every case of involvement with a family, the Protection and Safety worker must ask if the child is or may be an Indian child.

When there is reason to believe that the child is an Indian child as defined by law, the Protection and Safety worker must take action to determine the child's tribe(s). The worker must ask the child's parent or custodian if the child or family is affiliated with or members of any tribes. If age appropriate, the worker may also ask the child. If the worker is unable to gather sufficient information to identify the tribe(s), the one or more of the following must be taken to verify the child's status:

1. Contact relatives and extended family members;
2. Contact the Bureau of Indian Affairs Office; or
3. Contact the tribe(s) that the child may have a connection to.

## **INDIAN CHILDREN IMPACTED BY ICWA**

The Indian Child Welfare Act does not cover all children who identify themselves as Indian or whose family identifies the child as Indian. For a child to be considered an Indian child under ICWA, the child must be:

1. An unmarried person under the age of eighteen; and
2. A person who is either a member of an Indian tribe or eligible for membership and the biological child of a member of an Indian tribe.

## **DETERMINING TRIBAL MEMBERSHIP**

A tribe's determination that a child is a member or eligible for membership is conclusive. If a tribe does not respond to notice or inquiries as to membership, other parties in the case should present evidence to allow the state court to determine the status of the child. Tribes may not respond for a variety of reasons, and the child, parents and Indian custodian may have rights under ICWA. Evidence of membership may include documentation of enrollment or registration in a tribe, a Certificate of Degree of Indian Blood, an Indian Health Services' card, testimony of tribal authorities or elders, or any other evidence that would tend to prove that a child is an Indian child.

It is possible for a child to be eligible for membership in more than one tribe. Tribes may determine membership through any of the following:

1. Lineage (the child may be a descendant);
2. Enrollment;
3. Blood quantum;
4. Birth on a reservation; or
5. Any other standard or process of the tribe.

### **ENROLLMENT IN A TRIBE**

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written roles. Others have roles that list only persons that were members as of a certain date. Blood quantum is also not a determining factor. Whenever possible, tribes must make the decision of the child's status.

If assistance is needed in determining whether or not a child is a member or eligible for membership with a tribe, the worker may contact the Department's ICWA Specialist. The name and contact information for the ICWA Specialist is located on the HHSS Protection and Safety web site.

The worker must ask the tribe if the child is a member or eligible for membership and the biological child of a member.

### **INITIAL ASSESSMENT**

During the Initial Assessment, the Protection and Safety worker must assess the circumstances of the family. The worker must take into account the social and cultural conditions and the way of life of the child's tribe and/or the Indian community. The Protection and Safety worker must involve the tribe at the earliest point of intervention.

### **ACTIVE EFFORTS**

ICWA establishes a minimum federal standard for removal of an Indian child from their home and guidelines for placement in foster or adoptive homes. In order to meet this standard, evidence must be produced that illustrates that "active efforts" have been made to prevent the breakup of the family and that active efforts continue throughout the case to rehabilitate the family. This is a higher standard than the standard of "reasonable efforts" required for non-Indian children.

Active efforts must be made to keep the Indian family together. Active efforts means that everything possible must be done to help the family resolve the problems that led to neglect or abuse, including referral to services that are sensitive to the family's culture. The worker must involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian caregivers.

## **CONSENT TO VOLUNTARY PLACEMENT/ADOPTION**

When a parent or Indian custodian voluntarily consents to foster care placement (including guardianship) or termination of parental rights, the consent must be in writing and executed before a judge. A notarized consent is not valid. The judge must certify that the terms and consequences of the consent were fully explained in detail, and that the parent understood the consent. Any consent taken prior to birth or within 10 days after the birth of an Indian child is not valid.

## **WITHDRAWAL OF A CONSENT**

At any time a parent or Indian custodian may withdraw consent to a foster care placement (including guardianships) and the child must be returned to the parent or the state must begin involuntary proceedings.

## **CONSENT TO TERMINATION OF PARENTAL RIGHTS**

A parent or Indian custodian may withdraw consent to termination of parental rights or adoptions before the entry of a final decree of adoption, and the child must be returned to the parent or the state must begin involuntary proceedings.

## **PLACEMENT PREFERENCES IN OUT- OF- HOME- CARE**

When out-of-home placement is necessary, ICWA requires an order of preference for placement of children. This order of preference for placement is designed to keep Indian children in an Indian family whenever possible and is intended to preserve Indian communities and culture and to respect tribal sovereignty. This order of preference applies to the following types of placements:

1. Foster care placements;
2. Adoptive placements; and
3. Guardianship placements.

**Protection and Safety Worker Responsibilities in following the order of preference for placements:** The worker must follow the order of preference for placement when placing an Indian child in out-of-home care:

1. A member of the Indian child's extended family;
2. A foster home, licensed, approved or specified by the child's tribe, whether on or off the reservation;
3. An Indian foster home licensed or approved by an authorized non-Native American licensing authority;
4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

## **EXCEPTIONS TO PLACEMENT OF AN INDIAN CHILD IN A NON-INDIAN HOME**

An Indian child may be placed in a placement outside of the placement preferences only if a "diligent" search has failed to find a placement within the preferences. The child's tribe may establish a different preference order by tribal resolution, and this will be followed if it is the "least restrictive" placement appropriate to meet the child's needs. Where appropriate, the preference of the child or parent must be considered. If the

worker believes that good cause exists for not placing the child in a higher preference placement, the worker must attempt to obtain approval of the tribe.

Placement of an Indian child outside the placement preferences is the last option or alternative after all other options have been exhausted. A “tribal resolution” for a different order of placement preferences is an official statement by a tribe that the worker must follow in determining placement for the child.

As with all placements of children in HHSS –OJS custody, out-of-home placements under the order of preference for placement must be in the least restrictive setting, closest proximity to the family and that meets the child's special needs.

The worker must document specific efforts to follow placement preferences.

—

### **EMERGENCY REMOVAL OF AN INDIAN CHILD**

Emergency removal from the home does not require a placement that complies with ICWA's order of preference for placement.

All Foster care, Pre-adoptive, Adoptive placements or Guardianship placements must comply with the order of preference for placement absent good cause to the contrary. Best practice suggests that placement of a child be made according to ICWA's order of preference even at the point of an emergency placement when possible.

### **“GOOD CAUSE” NOT TO FOLLOW PLACEMENT PREFERENCES**

For purposes of foster care, pre-adoptive, adoptive placements or guardianship placement, a determination of good cause not to follow the order of preference for placement may be based on one or more of the following considerations:

1. The request of the biological parents or the child when the child is of sufficient age;
2. The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness; or
3. The unavailability of suitable families for placement after a diligent search has been completed for families meeting the order of preference criteria.

To comply with ICWA law, the party seeking to avoid the order of preference for placement has the burden of showing the need to avoid the placement preference.

Parental preference may constitute “good cause” not to follow the placement preferences. Good cause not to follow the order of preference for placement must be used only as a last resort. The worker must attempt to obtain the approval of the tribe for good cause not to follow the order of preference for placement.

## **NOTICE REQUIREMENTS**

In any involuntary custody proceeding concerning an Indian child, notice of the proceeding must be sent to the following:

1. The parents;
2. Indian custodians; and
3. To the tribe;

Notices must be sent by registered mail with a return receipt requested. Notices and the return receipts must be filed with the court and a copy must be kept in the Department file. The notice must be written in clear and understandable language and include the following information:

1. The name of the Indian child, the child's birth-date and birthplace, the names of the child's biological parents, maternal and paternal grandparents and great-grandparents and Indian custodians along with all known former names, aliases, addresses, dates and places of birth and death and any tribal affiliations with enrollment numbers if any and other identifying information;
2. The child's tribal affiliation;
3. A copy of the petition, complaint or other document by which the proceeding was initiated;
4. The name of the petitioner;
5. The name and address of the petitioner's attorney;
6. A statement of the right of the biological parents, Indian custodians and the child's tribe to intervene in the proceeding;

Indian custodian is an Indian person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary custody and control of the child has been transferred by the parent. If the custodian of the child is non-Indian, these protections do not apply.

7. A statement that if the parents or Indian custodians are unable to afford counsel, and where a state court determines indigence, counsel will be appointed to represent them;
8. The location, mailing address and telephone number of the court and all parties notified;
9. A statement of the right of the parents or Indian custodians and the child's tribe to have, on request, 20 days(or such additional time as may be permitted under state law) to prepare for the proceedings;
10. A statement of the right of the parents or Indian custodians or the child's tribe to petition the court to transfer the proceedings to the child's tribe, absent objection by either parent and subject to the right of the child's tribe's tribal court to decline transfer;
11. The potential legal consequences of an adjudication on future custodial and parental rights of the parents or Indian custodians; and
12. A statement in the notice to the tribe that tribal officials must keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not

need the information in order to exercise the tribe's right under the ICWA.

The original or a copy of each notice sent under this section must be filed with the court together with any return receipts or other proof of service. Copies must be maintained in the Department file.

Notice may be personally served on any person entitled to receive notice in lieu of mail service.

### **RIGHTS OF THE PARENT OR INDIAN CUSTODIAN**

If a parent or Indian custodian appears in court without an attorney, the court must inform him/her that they have certain rights as follows:

1. The right to appointed counsel;
2. The right to request that the proceeding be transferred to the tribal court;
3. The right to object to transfer to the tribal court;
4. The right to request additional time to prepare for the proceeding; and
5. The right to intervene in the proceeding (if the parent or Indian custodian is not already a party).

### **INTERVENTION**

The child's tribe, parents and Indian custodian have a right to intervene in the state court proceedings at any point in the proceeding.

Intervention allows a tribe, parent or Indian custodian to become a party in the proceeding and to have all of the rights of a party, including reviewing the court's file, calling witnesses and cross examining witnesses.

The Protection and Safety worker must contact the child's tribe and work with the tribe in providing services to the family.

### **TRANSFER FROM STATE COURT TO THE TRIBAL COURT**

Either parent, the Indian custodian or the child's tribe may, either orally or in writing, request the court to transfer the child's custody proceedings to the tribal court of the child's tribe. If the request is made orally it will be reduced to writing by the court and made a part of the record.

### **EVIDENCE**

The standard of evidence in ICWA cases is different from that of non-ICWA cases. To place a child in foster care, the Department must show, by clear and convincing evidence, that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.

At the court proceedings “evidence beyond a reasonable doubt” is needed, including “qualified expert witness” testimony, to terminate parental rights.

### **DETERMINATION OF GOOD CAUSE TO THE CONTRARY NOT TO TRANSFER A CASE TO THE TRIBAL COURT**

Good cause not to transfer the proceedings to tribal court exist if:

1. The Indian child's tribe does not have a tribal court as defined by the ICWA to which the case can be transferred;
2. The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing;
3. The child is over 12 years of age and objects to the transfer;
4. The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or
5. The parents of a child over 5 years of age are not available and the child has little or not contact with the child's tribe or members of the child's tribe.

### **NONCOMPLIANCE**

ICWA allows a parent, Indian custodian or tribe to ask a court to invalidate all prior proceedings if the proceedings do not comply with specific provisions of ICWA. The ICWA provisions that allow a party to ask a court to invalidate prior proceedings include: jurisdiction; transfer; intervention; full faith and credit to the public acts, records and judicial proceedings of Indian tribes; notice; time; appointment of counsel; examination of reports or other documents; active efforts to provide remedial services and rehabilitative programs; burdens of proof; failure to provide the testimony of an expert witness; and consent. ICWA allows a court to invalidate foster care and termination of parental rights proceedings. In addition, ICWA allows a court to vacate an adoption if consent to the adoption was based upon fraud or duress; a court has the power to vacate the adoption for adoptions that have been in place for up to two years, and possibly longer if state law allows.

Compliance with ICWA is necessary to ensure permanency for Indian children.